Table of Contents.

Question presented for review	1
Statement of the case	2
Argument	5
The decision by the Court of Appeals turned on an issue fully litigated at trial, on which the claimants had a full opportunity to, and did, introduce evidence	5
Conclusion	10

Table of Authorities Cited.

Cases.

Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958)	8
Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947)	8
Federal Trade Commission v. American Tobacco Co., 274 U.S. 543 (1927)	9
Fountain v. Filson, 336 U.S. 681 (1949)	8
Jamesway Corp. v. Worcester Valve Co., 443 F. 2d 205 (1st Cir. 1971)	5n
Petro v. Ohio Cas. Ins. Co., 95 F. Supp. 59 (S.D. Calif. 1950)	5n
Pipkin v. FMC Corporation, 427 F. 2d 353 (5th Cir. 1970)	6
Porto Rico Sugar Co. v. Lorenzo, 222 U.S. 481 (1912)	6n
Schaff v. R.W. Claxton, Inc., 144 F. 2d 532 (D.C. Cir. 1944)	8

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 9

United States v. Johnston, 268 U.S. 220 (1925) 9

Weade v. Dichmann, Wright, & Pugh, Inc., 337 U.S. 801 (1949) 8

Whiting Stoker Co. v. Chicago Stoker Corp., 171 F. 2d 248 (7th Cir. 1948), cert. denied, 337 U.S. 915 (1949) 6

REGULATIONS.

14 C.F.R. § 1.1 (1968) 2

In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1587.

HECTOR GONZALEZ, ET AL.,
Petitioners,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent in Opposition.

Question Presented for Review.

Should this Court grant certiorari to litigants who claim they were denied their right to a jury trial by the fact that the First Circuit Court of Appeals concluded on all the evidence that an insurance contract could be interpreted in only one way, when that interpretation was fully litigated in the District Court?

BLEED THROUGH

Statement of the Case.

In mid-1968 the respondent Commercial Insurance Company of Newark, New Jersey (Commercial) contracted with Conquest Airways, Inc. (Conquest) to insure certain air taxi operations of Conquest. That insurance contract was negotiated by the president of Conquest, who was an aviation professional with a pilot's license since 1958, a commercial license since 1962, and 3400 hours of logged flight time (A22 n.11). Under one typewritten provision of the insurance contract Conquest "warranted" that a copilot was to be carried on all instrument flight rules flights and "night flights." Several months later one of Conquest's planes, flying without a copilot, crashed at a time which was proven, without dispute by the claimants, to be "night" under the definition of that word set out in the regulations of the Federal Aviation Administration (FAA) (14 C.F.R. § 1.1 (1968)).

Contrary to the argument now made in the petition for certiorari, Commercial, from the very start of the fifteen-day trial on the coverage and liability questions in Commercial's declaratory judgment action against Conquest and the potential claimants, proposed that the term "night flights" in the insurance contract should be construed by reference to the precise definition of the word "night" in the FAA regulations. On the second day of trial, Commercial asked the District Court to take judicial notice of the definition section of the FAA regulations (R. Tr. 43),* and two days later read to the jury the definition of "night" which those regulations contain (R. Tr. 106-07). On the same day the contentions of the parties were discussed in a colloquy between counsel for the parties

---

*Because of the bulk of the record appendix on appeal, it was divided into categories which were cited as "R. Tr." for transcript, "R. Ex." for exhibits, and "R. Pl." for pleadings.

and the court, in which Commercial contended that the term "night flights" was governed by the definition of "night" in the FAA regulations. (Original record, Vol. XXX, January 20, 1972, at 248-252.) In that exchange counsel for Commercial and counsel for the claimants agreed the term "night flights" was governed by the regulations.* The only dispute was between Commercial's contention that the definition of "night" was controlling, and claimants' contention that a section establishing certain "night experience" requirements was applicable. On the second day of the trial Commercial offered a witness who was a professional pilot with 6,000 hours of command pilot experience, whom the claimants acknowledged to be an aviation expert (R. Tr. 70-71), who testified that "night" was understood in the aviation profession to mean the same period as that described in the FAA regulations (R. Tr. 74).

At the conclusion of the coverage trial, Commercial moved for a directed verdict on the ground (among others) that the fatal flight was one at "night" under the definition in the FAA regulations (R. Tr. 475) and, when that motion was denied, submitted a requested instruction to the same effect (R. Pl. 162 (Instruction No. 13)). After the jury's verdict was returned, Commercial moved for judgment notwithstanding the verdict on the ground, among others, that the meaning of the term "night" was absolutely clear (R. Tr. 537).

Thus, the claimants at trial well understood that Commercial was arguing that the term "night flights" in the insurance contract should be construed in accordance with the definition of "night" in the FAA regulations. As noted above, the claimants themselves contended the term was to be construed in

---

*"Mr. Nachman [lead counsel for the defendants]: . . . A night flight is defined in only one place, in the Civil Air Regulations.

Mr. Vivas [counsel for the plaintiff]: In only one place.

The Court: We agree on that."

(Original record, Vol. XXX, January 20, 1972, at 248.)

BLEED THROUGH

accordance with the regulations, and they asked the District Court to take judicial notice of a different provision of the FAA regulations, which they contended at the trial, and on appeal, should be the basis for the interpretation of the term "night flight" (R. Tr. 86-87, 464-69). Until they filed their petition for rehearing in the First Circuit, the claimants had therefore taken the position that the insurance contract term "night flights" was in fact to be construed by reference to the FAA regulations which set out the technical understanding of one familiar with aviation. The only difference between their position and that of Commercial concerned which provision of those regulations controlled.

This statement of facts presents all of the evidence and proceedings below which are necessary for a determination of the claimants' petition to this Court. In the interests of brevity there has been no attempt to deal with the extraneous matters and frequent misstatements in the statement of the case contained in the claimants' petition for certiorari. *

---

*One such example, however, cannot go unrefuted. The claimants offhandedly suggest that Conquest's president testified that the "night flights" copilot warranty was waived (Petition at 4). The record referred to does not support that statement. Even if the record in question, consisting of the Conquest president's answers at a deposition, were admitted for more than the limited purpose of impeaching his testimony at the trial, the deposition answers stated no more than that an employee of a local insurance agency had said he was going to "request" the insurance company to make a change in the copilot requirement (R. Tr. 43b). The further erroneous suggestion (Petition at 4) that it was impossible to determine whether "this agreement" had been reduced to writing, because "the entire policy" was not produced at the trial, relates to an issue fully disposed of in the First Circuit opinion (A22-A28), which is not presented to this Court by the petition for certiorari. Furthermore, the First Circuit noted (A19), "[t]he court charged the jury, *without exception by defendants*, that this provision 'in which the insured warrants that a copilot will be carried on night flights is valid and binding upon the insured, provided it is not ambiguous, and [if] there is a breach of warranty there is no coverage and no recovery permitted under the policy.'" (Emphasis supplied.)

Argument.

The Decision By The Court Of Appeals Turned On An Issue Fully Litigated At Trial, On Which The Claimants Had A Full Opportunity To, And Did, Introduce Evidence.

This Court only needs to recognize the two essential flaws in the claimants' argument to determine that their petition must be denied. Their argument rests on the erroneous assumptions that the First Circuit based its decision upon a burden-of-proof shifting presumption, and that this presumption was "newly-created" (see, *e.g.*, Petition at 2, Question Presented). Neither assumption is correct.

As the First Circuit noted in its denial of the claimants' petition for rehearing (A30), the question of burden of proof never arose, since the meaning of the phrase "night flights" was so clear in light of the definition of "night" in the FAA regulations. The First Circuit's determination that the meaning of "night flights" is governed by the definition of "night" in the regulations does not come from the invocation of any burden of proof principles, but from applying familiar principles of contract construction to the terms of the insurance contract and the circumstances of the parties to the contract. Thus, the First Circuit noted that the contract itself "imported the regulations," by making reference to "air navigation regulations or instructions applying to . . . night flying" (A21-A22, A30).* And, noting that Gonzalez had extensive experience in

---

*Even the clause that required a copilot on "night flights" also required a copilot on "instrument flight rules" flights. Giving terms of a contract their technical meaning where other provisions in the contract reflect reference to the source of the technical meaning is an application of well settled principles. *See, e.g., Petro* v. *Ohio Cas. Ins. Co.*, 95 F. Supp. 59, 62 (S.D. Calif. 1950); *Jamesway Corp.* v. *Worcester Valve Co.*, 443 F. 2d 205, 210 (1st Cir. 1971).

BLEED THROUGH

the aviation industry, as a pilot, and in aircraft insurance (A22 n.11), the court applied the principle that a business or a professional person entering into a contract relating to a certain industry is expected to have the usual sophistication and understanding of those in the industry.

Nor does the First Circuit decision present a constitutional issue concerning the right to a jury trial. It is elementary under the established allocation of functions between court and jury that the determination whether a contract is ambiguous, and, if unambiguous, the determination of its meaning, are questions of law for the court to decide. *Whiting Stoker Co.* v. *Chicago Stoker Corp.*, 171 F. 2d 248, 250-251 (7th Cir. 1948), *cert. denied*, 337 U.S. 915 (1949); *Pipkin* v. *FMC Corporation*, 427 F. 2d 353, 356 (5th Cir. 1970). In determining upon the stipulated facts that the insurance contract was unambiguous and did not provide coverage for the air crash, the First Circuit was discharging the established responsibility of a court. The claim of a disappointed litigant that the court has erred in the construction of a contract does not convert the question of contract construction into an appropriate case for certiorari as involving a constitutional right to jury issue. If it did, every major case of contract construction would be waiting on the doorstep of this Court.

In their petition the claimants in effect concede this. They seek to convert the decision below into an alleged denial of jury trial by misstating the proceedings in the District Court. They allege that the decision of the First Circuit changed the applicable legal theory without warning on appeal.* Based on

*To the extent that the claimants suggest that the First Circuit's decision was "newly-created" law in general (see, *e.g.*, Petition at 6), their argument is frivolous. It is not "new" law to hold that technical terms in a contract between persons in a trade or business are construed in their technical sense. *Porto Rico Sugar Co.* v. *Lorenzo*, 222 U.S. 481, 482 (1912). Nor, clearly, is it "new" law to have the court, and not the jury, determine a question of law such as the interpretation of an unambiguous contract term. See cases cited in the preceding paragraph of the text, *supra*.

that supposed change, the claimants spin an argument that they were denied their right to a jury trial from the further allegation that they would have presented different arguments and evidence in the District Court had they known of the later theory. They therefore ask this Court for an opportunity to try this case again from the start, even though fifteen days of trial on the coverage issue alone were had below.

The facts of this case fail to support the essential parts of the claimants' argument. The insurance coverage issue was tried on the theory that the term "night flight" was to be construed in connection with the FAA regulations. At trial, as Commercial's statement of the case in this brief shows, Commercial from the very start directed the District Court to the FAA regulations for a definition of the term "night" (R. Tr. 43, 106-07). The District Court never adopted any legal theory which could have misled the claimants or caused them not to offer evidence which could have resulted in a different conclusion under the First Circuit's decision. Indeed, at the outset of the coverage trial, in its Pretrial Memorandum, the District Court invited the parties to present evidence on all coverage issues by its determination that the issues as to the lack of coverage "are mixed matters of law and fact which the Court finds should be decided at trial" (R. Pl. 151). The closest the District Court came to adopting any theory itself was in its instructions to the jury. The claimants cannot say that what they heard at that late point had any relevant effect on what they offered into evidence.

In fact, the claimants themselves agreed that the term "night flights" was a technical term (Original record, Vol. XXX, at 248). They simply proposed a different section of the FAA regulations as the source of a different technical definition for "night" (R. Tr. 86-87, 464-69). That argument, which they pressed as well on appeal, was demonstrated conclusively by the First Circuit decision to be wrong (A20-A22). But apart

BLEED THROUGH

from its merits, the fact that the claimants pressed it in the trial court and on appeal belies their argument to this Court that the First Circuit's decision took them unfairly by surprise.

In fact, the First Circuit's decision applied the correct law which Commercial had proposed from the start. The claimants were fully aware of that argument, and proceeded to meet it as best they could. The claimants stretch credulity when they begin to argue, at this late stage, that they were taken by surprise. Losing on the merits of the coverage dispute may have surprised the claimants; but they had full opportunity to meet the issue in the District Court, and undertook to do so with whatever arguments or evidence they could muster.

Seen in its true light, it is understandable that the claimants' argument does not draw support from any of the cases cited in their petition. Cases cited (Petition at 9-10) as requiring a new trial rather than a direction to enter judgment for Commercial are not applicable to the present case. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), finding error in the direction of judgment notwithstanding the verdict in favor of a party who failed in the trial court to move for judgment notwithstanding the verdict, is irrelevant here. As the claimants themselves admit (Petition at 6), Commercial in fact moved in the District Court for judgment notwithstanding the verdict. Most of the other cases relied upon by the claimants are as readily distinguishable, since they relate to situations where for one reason or another the trial court's erroneous choice of the applicable rule apparently foreclosed the party from pursuing evidence which would have been relevant under the rule adopted by the Court of Appeals. *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 532-33 (1958); *Weade* v. *Dichmann, Wright, & Pugh, Inc.*, 337 U.S. 801, 808-09 (1949); *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949); *Schaff* v. *R.W. Claxton, Inc.*, 144 F. 2d 532, 533 (D.C. Cir. 1944). The claimants in this case had a full opportunity and in fact

presented evidence in attempted refutation of the point on which they ultimately lost. The District Court never made a ruling which could have foreclosed them from doing so. Rather by its Pretrial Memorandum it did precisely the opposite. How the claimants could say they were denied an opportunity to present their evidence is, as the First Circuit said of them in a different context, "hard to think" (A30).

The request which the claimants in truth make of this Court is that it review the record which the First Circuit reviewed, to see if this Court will arrive at a different conclusion. But this Court has repeatedly stated that it does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). This Court consistently declines to interfere with the conclusions of Courts of Appeal, whether or not it would agree with such conclusions if it completely reviewed the evidence, when the conclusions are based upon the "appreciation of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543, 544 (1927). The claimants present only a question of construction of a particular contract which, under these principles, would not be a proper subject for certiorari.

If this Court granted certiorari in this case to review the determination of the First Circuit, there would be no basis in reason for denying certiorari to any other decision of any federal or state appellate court which determined a contract to be unambiguous and decided the interpretation of the contract as a question of law in accordance with the traditional responsibility of a court.

BLEED THROUGH

Conclusion.

The petition for certiorari should be denied.

By its attorneys,

JOHN A. PERKINS,
JEFFREY SWOPE,
PALMER & DODGE,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 227-4400